

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CLEAR-VIEW TECHNOLOGIES, INC.,

Plaintiff,

v.

JOHN H. RASNICK, et al.,

Defendants.

Case No. [13-cv-02744-BLF](#)

**ORDER DENYING MOTION TO
INTERVENE**

[Re: ECF 155]

Proposed intervenor Stroz Friedberg seeks to intervene in the above-captioned dispute, scheduled to begin trial on June 8, 2015. Defendants oppose. Plaintiff has filed a conditional non-opposition, stating that it does not oppose intervention so long as it would not delay trial. Because the Court finds that Stroz Friedberg does not meet the conditions for permissive intervention, the Court DENIES the motion.

I. BACKGROUND

On September 9, 2014, Magistrate Judge Paul Grewal granted Plaintiff's motion to compel further discovery responses to Plaintiff's interrogatories and requests for admission and an independent inspection of Defendants' electronic databases and media. *See* ECF 76; *cf.* ECF 62 at 13-18. The parties were instructed to meet and confer on a plan to retain an independent consultant to perform a limited forensic collection and analysis of Defendants' electronic media. *See id.* The parties were unable to reach agreement between two forensic analysts – LogicForce Consulting, LLC and Stroz Friedberg. *See, e.g.,* ECF 100, 101 (discovery dispute letters). Defendants preferred LogicForce because they submitted a lower estimate for the examination. ECF 100 at 1-2. The court ultimately ordered the parties to engage Stroz Friedberg to undertake the independent inspection, the cost of which would be borne by Defendants. *See* ECF 103.

1 Stroz Friedberg quoted Defendants high and low cost estimates for the examination, with a
 2 low estimate of \$52,375 and a high estimate of \$108,000. *See* ECF 100; *see also* Mot., ECF 155 at
 3 2-3. Defendants paid Stroz Friedberg a retainer of \$25,000. *See* Haimovici Decl. Exh. D at 1. Stroz
 4 Friedberg contends that Defendants obstructed and delayed the investigation, resulting in a total
 5 cost of over \$214,000, nearly double its high estimate. Defendants counter that they promptly
 6 provided all media to Stroz Friedberg. Stroz Friedberg states that Defendants refused to pay the
 7 amount due on January 22, 2015. *See* Mot. at 5 (citing Haimovici Decl. Exh. E).

8 On April 2, 2015, Stroz Friedberg moved to intervene in this action pursuant to Federal
 9 Rule of Civil Procedure 24(b)(1), and moved to shorten time in which the motion could be heard.
 10 *See* ECF 169. The Court denied the motion to shorten time, but submitted the underlying motion
 11 to intervene without oral argument upon the filing of Stroz Friedberg's Reply on April 23, 2015.
 12 *See* ECF 172 at 2 (citing Civil L.R. 7-1(b)).

13 **II. LEGAL STANDARD**

14 Rule 24(b) governs permissive intervention. A court may grant permissive intervention if
 15 three conditions are met: (1) the movant must show an independent ground for jurisdiction; (2) the
 16 motion must be timely; and (3) the movant's claim or defense and the main action must have a
 17 question of law or fact in common. *See Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989).
 18 The existence of a common question of law or fact "does not automatically entitle an applicant to
 19 intervene." *Id.* at 530. Rather, Rule 24(b) "vests discretion in the district court to determine the
 20 fairest and most efficient method of handling the case." *Id.* (citing *SEC v. Everest Mgmt. Corp.*,
 21 475 F.3d 1236, 1240 (2d Cir. 1972)). This means that the court must determine whether
 22 intervention will "unduly prejudice the adjudication of the rights of the original parties" to the
 23 underlying suit. Fed. R. Civ. P. 24(b). The proposed intervenor bears the burden to show that all
 24 conditions for intervention are satisfied. *See, e.g., Citizens for a Balanced Use v. Montana*
 25 *Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (noting, however, that the "review is guided
 26 primarily by practical considerations, not technical distinctions").

27 **III. DISCUSSION**

28 Defendants do not challenge Stroz Friedberg's assertion that diversity jurisdiction exists

1 over the proposed action. *See generally* Opp. The Court therefore looks to the remaining two
2 conditions that Stroz Friedberg must show in order to intervene, timeliness and common questions
3 of law or fact. The Court finds that neither is met here, for the reasons outlined below.

4 **A. Timeliness**

5 Rule 24(b)'s timeliness inquiry concerns three factors: (1) the stage of the proceedings at
6 which intervention is sought, (2) the reason for and length of delay in seeking intervention, and (3)
7 the prejudice that would be suffered by other parties were intervention to be granted. *See, e.g.,*
8 *State of Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997).

9 As to the first and third factors, the motion to intervene was filed just two months before
10 trial is scheduled to begin in this action, and over two months after the close of fact discovery.
11 Stroz Friedberg contends that its motion is timely because it was filed "at the first opportunity
12 once it became clear that Defendants would not pay what they owe." Mot. at 5. Though Stroz
13 Friedberg filed its motion just over two months after Defendants indicated they disputed the
14 amount owed, even this delay is significant when trial is rapidly approaching. The late stage of the
15 litigation, and the pleadings, motions, and discovery necessary to position Stroz Friedberg's
16 claims for trial counsel against permitting intervention due to the third Rule 24(b) factor, prejudice
17 to the original parties to the litigation.

18 Courts have repeatedly held that prejudice to the parties is the "most important factor in
19 determining the timeliness of a motion to intervene." *Petrol Stops Nw. v. Continental Oil Co.*, 647
20 F.2d 1005, 1010 (9th Cir. 1981). It is clear to the Court that Stroz Friedberg's intervention would
21 necessitate a delay in trial, prejudicing all original parties. Though Stroz Friedberg claims that it
22 would need only "limited discovery" and that it "does not seek to modify the current trial date,"
23 *see* Mot. at 5, the Court finds these assertions untenable. Stroz Friedberg would first need to file a
24 Complaint, which would be subject to a responsive pleading or motion(s) from Defendants; it
25 would then need to formulate a discovery plan, adjudicate any disputes over discovery, and engage
26 in depositions and document production. Plainly, even setting the pleadings would take more time
27 than is available prior to the scheduled first day of trial. The "limited discovery" Stroz Friedberg
28

1 seeks to take could itself require substantial time.¹ Further, even attempting to fit the entirety of a
 2 new case from complaint to trial in six weeks would prejudice Defendants, who would be forced
 3 while preparing to defend themselves against Plaintiff's claims to also litigate a whole new
 4 controversy against Stroz Friedberg in a substantially limited timeframe. *Cf., e.g., Yniguez* at 731-
 5 32.

6 The Court therefore finds that intervention is not timely because it would delay trial and
 7 prejudice the ability of all original parties' to adjudicate their interests in this litigation.

8 **B. Common Questions of Law or Fact**

9 Though the Court may deny a motion to intervene on grounds of timeliness alone, *see Nw.*
 10 *Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (denying a motion to intervene under Rule
 11 24(b) because the proposed intervenor failed to show one of the three prongs needed for
 12 intervention), the Court also finds that Stroz Friedberg has not shown a common question of law
 13 or fact with the underlying litigation such that intervention would be appropriate. Stroz Friedberg
 14 identifies as its common question of law or fact "Defendants' discovery conduct," noting that the
 15 Court is "currently considering a motion for sanctions alleging that Defendants spoliated evidence
 16 [and] have not produced requested materials." Mot. at 5. It further argues that its claims "depend
 17 heavily on this Court's order adopting the parties' agreement that Defendants bear the costs of
 18 Stroz Friedberg's services." *Id.* at 6. Neither of these arguments is persuasive.

19 First, Stroz Friedberg's identified common question of law, Defendants' alleged improper
 20 discovery conduct, is not a question common to the claims Plaintiff is asserting in this litigation or
 21 the facts that give rise to this dispute – namely alleging that Defendants tortuously interfered with
 22 a contractual relationship, engaged in unfair competition under California Business & Professions
 23 Code § 17200, breached a contract, or engaged in a civil conspiracy. *See First Amended*
 24 *Complaint*, ECF 37 at 1. Stroz Friedberg's claim for fees related to its forensic investigation arises
 25 only from the conduct of one of the parties in this litigation, not from the underlying causes of
 26

27 ¹ Because the Court finds that a trial continuance would be necessary were Stroz Friedberg to
 28 intervene, it interprets Plaintiff's conditional non-opposition, which was premised on no delay to
 the trial schedule, as an opposition to the motion to intervene.

1 action at issue in this litigation.

2 Stroz Friedberg's argument relies heavily on *Venegas v. Skaggs*, a Ninth Circuit case in
3 which the court found that the district court had abused its discretion when it denied a motion to
4 intervene. In *Venegas*, a plaintiff alleged various causes of action regarding a civil rights violation,
5 including a claim under 42 U.S.C. § 1988. Plaintiff and his attorney had entered into a contingent
6 fee agreement, in which the attorney was entitled to 40 percent of the damages awarded at trial,
7 but that any statutory fees awarded under Section 1988 would be deducted from this amount. The
8 agreement between the parties further "allowed [counsel's] intervention to protect his interest in
9 the fees." 867 F.2d 527, 529. In post-trial motions, plaintiff's trial counsel successfully obtained a
10 fee award. The district court also found that Section 1988 did not put a ceiling on trial counsel's
11 fees and confirmed as reasonable the contractual 40 percent contingent fee arrangement. On
12 appeal plaintiff obtained new counsel and the trial attorney moved to intervene in the district court
13 action to confirm a lien on the judgment to protect his fees. The district court denied the motion to
14 intervene even though no party opposed it. *See id.* at 529-30. The Ninth Circuit found that ruling
15 to be an abuse of discretion. *Id.* at 531.

16 In this case, the circumstances are quite different. Defendants oppose intervention, and
17 Plaintiff's conditional non-opposition is predicated on no delay in the trial schedule, which the
18 Court has found infeasible. Stroz Friedberg also has no explicit contractual right to intervene in
19 the action to protect its interest. Here, Stroz Friedberg is not attempting to protect its earned
20 percentage interest in a judgment, but instead wants payment on an amount of fees disputed by a
21 party to the litigation. Stroz Friedberg's right, if any, to the over \$214,000 it seeks from
22 Defendants is not implicated by any determination that could be made by the Court or a jury *in*
23 *this action*. There is no relationship between Stroz Friedberg's claim against Defendants and the
24 claims or facts that give rise to Plaintiff's action against Defendants. A dispute over the payment
25 of fees for litigation services is not rendered common to the underlying action simply because both
26 parties allege that Defendants have engaged in bad behavior during discovery. Tellingly, Stroz
27 Friedberg cites no cases in its motion or reply where a court appointed expert (or any expert) was
28 permitted to intervene in an underlying action simply by virtue of a fee dispute with one of the

parties to that action.

Stroz Friedberg's argument that the Court must determine whether the fees are reasonable, and that these fees are taxable costs, *see* Mot. at 6-7, is irrelevant to determining whether the claim raised by Stroz Friedberg has questions of law or fact common to the underlying litigation. Stroz Friedberg's argument, taken to its logical conclusion, would expand Rule 24(b) to permit intervention by *any* expert or litigation support services provider in litigation where fees are disputed.

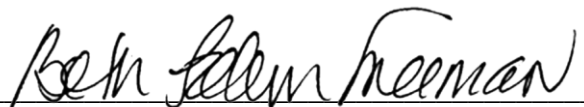
Rule 24(b) was designed to promote efficiency by allowing the Court to adjudicate disputes between multiple parties when it would be fair to do so and when the questions raised by the intervenor are common to those raised by the plaintiff or defendant in the action. *See, e.g., Venegas* at 529-31. Such a situation is not present here. Were Stroz Friedberg able to intervene in this action at this late stage of the litigation, it would prejudice both parties to the underlying action. Additionally, Stroz Friedberg has not shown that its fee dispute with Defendants shares common questions of law or fact with the underlying litigation.

IV. ORDER

Stroz Friedberg has not shown that its motion is timely or that its claim (or claims) against Defendants has questions of law or fact common to this action,² and therefore fails to meet its burden to show that permissive intervention is appropriate. For these reasons, Stroz Friedberg's motion to intervene is DENIED.

IT IS SO ORDERED.

Dated: April 28, 2015


BETH LABSON FREEMAN
United States District Judge

² Because Stroz Friedberg has not filed a proposed complaint with its motion to intervene, the Court is unclear as to how many causes of action it would seek to assert against Defendants in order to vindicate its allegations for breach of contract.